

E-filed on 10/18/06

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE CYGNUS TELECOMMUNICATIONS
TECHNOLOGY, LLC, PATENT
LITIGATION

No. MDL-1423
(C-04-04247 RMW)

THIS ORDER RELATES TO:

ORDER DENYING DEFENDANT'S
MOTION TO STRIKE; DENYING
PLAINTIFF'S MOTION FOR RELIEF
UNDER RULE 60(b)(3)

CYGNUS TELECOMMUNICATIONS
TECHNOLOGY, LLC,

[Re Docket Nos. 102, 107, 111, 116, 120]

Plaintiff,

v.

AT&T CORP.,

Defendant.

Cygnus Telecommunications Technology, LLC, has filed a motion ostensibly for relief under Fed.R.Civ.P. 60(b)(3). Cygnus, however, essentially seeks (1) reconsideration of this court's November 29, 2005 order granting defendant AT&T Corporation's motion for judgment on the pleadings, and (2) leave to file a third amended complaint. AT&T Corp. moves to strike Cygnus's motion.

On this court's own motion, these two motions are deemed submitted on the papers. No oral argument will be held; no appearance is needed.

ORDER DENYING DEFENDANT'S MOTION TO STRIKE; DENYING PLAINTIFF'S MOTION FOR RELIEF UNDER RULE 60(b)(3)

—No. MDL-1423 (C-04-04247 RMW)

JAH

AT&T Corp.'s motion to strike is denied. A motion to strike is not properly brought *ex parte*. In any case, nothing in Cygnus's motion is impertinent or scandalous. Whether Cygnus's motion contains redundant or immaterial matter is moot in light of the court's ruling on the motion.

Cygnus is not entitled to relief under Fed.R.Civ.P. 60(b)(3) because the November 29, 2005 order is not "final" as required by that rule. Additionally, the allegedly fraudulent conduct of AT&T Corp. occurred before this suit was filed. Fed.R.Civ.P. 60(b)(3) is intended to remedy only fraud committed during litigation. *Roger Edwards, LLC v. Fiddes & Son Ltd.*, 427 F.3d 129, 134 (1st Cir. 2005).

Even considering Cygnus's motion as (an albeit procedurally improper) request for reconsideration of the November 29, 2005 order, the court affirms the November 29, 2005 order. Cygnus's attempt to revive its claim for misappropriation of trade secrets is thus futile and leave to file the proposed revised third amended complaint is denied.¹ Additionally and independently, Cygnus's attempt to amend its complaint again comes too late in this litigation. *See Solomon v. N. Am. Life & Cas. Ins. Co.*, 151 F.3d 1132, 1139 (9th Cir. 1998).


Cygnus's motion insofar as it seeks to add AT&T Inc. as a defendant is also denied. Plaintiff apparently has no facts (and has not pleaded any) suggesting AT&T Inc. as a parent is liable for the acts of AT&T Corp. Cygnus says it wants to name AT&T Inc. in order to pursue successor liability if necessary. Plaintiff has pleaded no facts showing a basis or need to name AT&T Inc.

ORDER

For the reasons stated above, the court

1. denies AT&T's motion to strike, and
2. denies Cygnus's motion for relief under Fed.R.Civ.P. 60(b)(3).

DATED: 10/18/06


RONALD M. WHYTE
United States District Judge

¹ Cygnus does not even mention Minnesota law, which the court had previously determined applied to the trade secret misappropriation claim. Cygnus instead refers to the law of other jurisdictions and the Uniform Trade Secrets Act.

1 A copy of this order was mailed on _____ to:

2 **Counsel for Plaintiff:**

3 John P. Sutton
2421 Pierce Street
4 San Francisco, CA 94115-1131

5 Lewis Donald Prutzman
Tannenbaum Helpert Syracuse & Hirschritt LLP
6 900 Third Avenue
New York, NY 10022

7 **Defendants:**

8 Felice B. Galant; Joseph P. Zammit
9 Fulbright & Jaworski L.L.P.
666 Fifth Avenue
10 New York, NY 10103-3198

11 Gregory B. Wood
Fulbright & Jaworski L.L.P.
12 865 South Figueroa Street, 29th Floor
Los Angeles, CA 90017

13 Kieran Patrick Fallon
14 436 SW 8th Street
Miami, FL 33130-2814

15 **Courtesy Copy:**

16 Clerk of the Panel
17 Judicial Panel on Multidistrict Litigation
Thurgood Marshall Federal Judiciary Building
18 One Columbus Circle, N.E.
Room G-255, North Lobby
19 Washington, D.C. 20002-8004

20 Counsel are responsible for distributing copies of this order to co-counsel, as necessary.
21
22
23
24
25
26
27
28